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CARL F. GRUNENTHAL,

*Petitioner*

v.

THE LONG ISLAND RAIL ROAD COMPANY

*Respondent*

**PETITIONER'S REPLY BRIEF**

MILFORD J. MEYER  
One East Penn Square  
Philadelphia, Pa. 19107

*Attorney for Petitioner*

*Of Counsel:*

IRVING YOUNGER  
New York University School of Law  
Washington Square  
New York, New York 10003

MEYER, LASCH, HANKIN & POUL  
One East Penn Square  
Philadelphia, Pennsylvania 19107

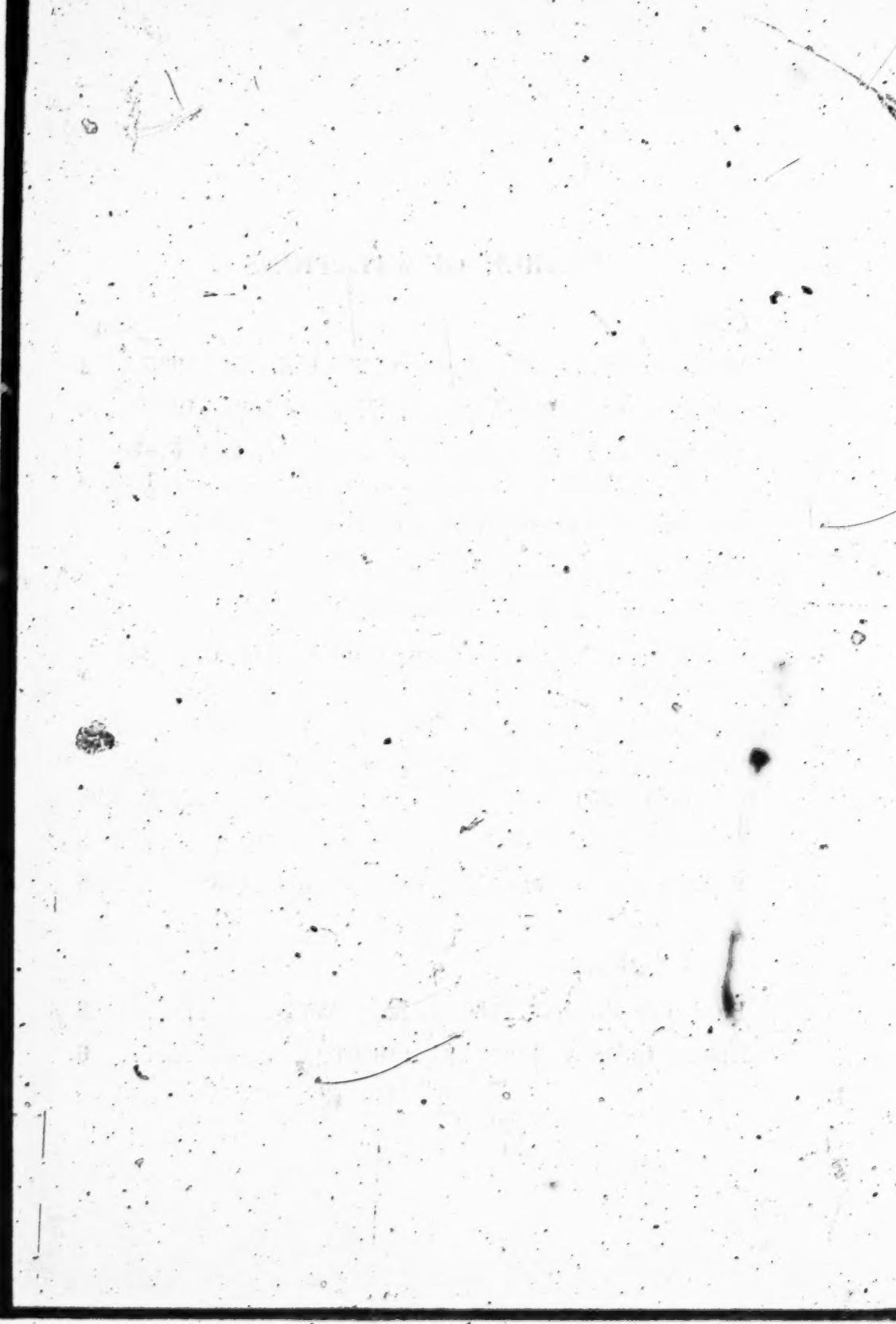
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## PETITIONER'S REPLY BRIEF

In its Brief, Respondent has not adopted the position taken by the court below and other Courts of Appeals on the constitutional question involved and the subsidiary issues raised. Some of the novel assertions there made necessitate the filing of this Brief.

### I.

(a) Its argument on the constitutional issue here raised is based upon its conclusion that it is controlled by *Neely v. Eby Const. Co.*, 386 U.S. 317 (1967). The basic fallacy of this argument has already been laid bare in our principle Brief. Simply stated, it is that appellate review of the entry of a judgment n.o.v., or the failure to do so, is purely and simply a question of law; review of the grant or refusal of a new trial for excessiveness is purely and simply a question of fact. *Neely* and its precursors (*Baltimore & C. Line v. Redman*, 295 U.S. 654, 658 (1935); *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940); cf. *Galloway v. United States*, 319 U.S. 372 (1943)) proceed upon the acknowledged principle that review of a question of law is not within the prohibition of the Seventh Amendment. None of these decisions, nor any other decision of this Court, has approved the review of any question of fact. Absent acceptance by this Court of the *Dagnello* view that "abuse of discretion" can be converted in some way to a question of law, Respondent's argument lacks even the appearance of validity.

Respondent blandly states (Br. 10) that "the standard applied by appellate courts in reviewing remittiturs is precisely that used by them in reviewing judgments n.o.v." This statement is completely erroneous and unsupportable. The standard for reviewing or for entering judgment n.o.v. is whether there is any evidence at all to support the verdict; the standard which the Courts of Appeals have been using (and that ostensibly used by the court below) is whether the trial judge abused his discretion.

Respondent carries this argument further (Br. 12) by stating that "the similarity between the issues of the sufficiency of evidence to sustain a finding of liability and the sufficiency of evidence to justify a particular damage award is readily apparent." Not only is any such similarity not apparent, it is non-existent. On the contrary, determination of the validity of a damage award is precisely similar to determination of the weight of the evidence. And the approval by this Court of the principle that appellate courts may review the quantum of an award must require approval of a similar right to review the weight of the evidence in every case.

Another completely illogical non-sequitur is Respondent's argument that *Neely*, by recognizing the power of the Courts of Appeals to grant new trials where legal errors have been committed, concedes their power to grant new trials upon review of the weight of the evidence or the quantum of the verdicts. The right to reverse for legal error cannot, by some type of inverse logic, imply the power to review facts found by a jury.

(b) Respondent also argues that the pre-Amendment practice in England of considering motions for new trial by the court en banc is justification for appellate review of jury findings of fact. We have reviewed all of the early English cases cited by the authorities noted in our principle brief (Br. 12-15) and have been unable to find a single case in which a new trial was granted because the verdict was against the weight of the evidence or the damages were excessive in which the trial judge did not sit upon the motion. The conclusion reached by *Barron & Holtzoff* (§1301.1, page 355) is justifiable; "the verdict could be set aside only if the judge who had presided at the trial and heard the witnesses deemed the verdict to be unjustified, and even then, only if he could persuade his brethren at Westminster to this view."

The Court here is not faced with a question of procedural reform which may proceed upon some flexible construction of the Amendment as is suggested by Respondent

(Br. 21). It is asked to restate the basic principles that issues of fact are not subject to review and that the quantum of a jury verdict is an issue of fact. In our original Brief we have demonstrated that both principles have been firmly established by this Court (Br. 5-9).

Does not the Respondent's position boil down to a single proposition: that the quantum of a jury verdict may be converted into a question of law by some legal legerdemain? Why the quantum of the verdict and not the quantum of the evidence? If the reviewing court may not reduce a verdict because it would not have awarded more than some smaller amount (which it concededly cannot do), what greater power can it take by rephrasing its holding to read that it cannot "arrive at a sum in excess of" some smaller amount?

(c) If the court below had the constitutional power to re-examine "the fact tried by a jury" was its re-examination based on a proper standard? Although it set up as its standard "abuse of discretion of the trial judge", decreed by its earlier opinion in *Dagnello*, it ignored this standard in deciding the case. In its place, it examined the verdict subjectively and the majority of two judges concluded: "we cannot in any rational manner . . . arrive at a sum in excess of \$200,000." The characterization of the verdict in this case by the court below as one which it could not "arrive at" is a far weaker criticism than that made by the Fourth Circuit in *Neese* (216 F. 2d 772, 776). There it was said that the verdict was "far beyond the pale of any reasonable probability and entirely without support in the record."

Finally, let us juxtapose what the court below did with what the Seventh Amendment says:

" . . . (W)e cannot in any rational manner . . . arrive at a sum in excess of \$200,000." (A. 66)

" . . . (N)o fact tried by a jury, shall be otherwise re-examined . . . than according to the rules of the common law."

All of Respondent's argument to the contrary notwithstanding, it is apparent that the court below here "re-examined" a "fact tried by a jury". The single constitutional question involved is whether it had the power to do so.

## II.

In our original Brief we have demonstrated that the argument that review of the discretion of the trial judge is a question of law is indefensible. Respondent's Brief apparently concedes the point since it makes a studied attempt to avoid this issue and to bring the decision of the court below within the narrow limit of the scope of review which might remotely be thought to be sanctioned by *Neese*. Unfortunately for Respondent, the majority below made no attempt to review the evidence supporting the amount of the verdict in order to determine whether it is "without support in the record". At no point does it even attempt to demonstrate any error in the trial judge's evaluation of the evidence (A. 56, 57). The fact is otherwise. The court below makes clear (and Respondent elsewhere concedes, Brief 13-14) that it has applied the rule which it had established in *Dagnello* that remittitur may be directed for "abuse of discretion". This criterion had been rejected by the court below (following *Neese*) in *Caskey v. Village of Wayland*, 375 F. 2d 1004 (1967), and even its application to the instant case is denied by Judge Hays, dissenting (A. 67). Petitioner's Brief on the Merits has considered this question at length.

For the record we must also challenge Respondent's statement (Br. 27) that this Court in *Neese* recognized the authority of a Court of Appeals to order a new trial for excessiveness on the ground that the trial court's failure to do so was an abuse of discretion. Not a word there said can justify any such conclusion.

## III.

Respondent attempts to read *Railroad Co. v. Fraloff*, *Wabash Ry. v. McDaniel*, *Metropolitan R. R. v. Moore* and *Lincoln v. Power* as precluding "an appellate court from determining on its own view of the facts that a verdict is excessive" but not so precluding review if it "views the facts in the light most favorable to the plaintiff, but nevertheless concludes that the verdict is excessive as a matter of law" (Br. 15-16). This is not only pure sophistry but exhibits gross misinterpretation of the clear language of this Court.

Did the trial judge err in finding, from a careful study of the record and his observation of the plaintiff and his witness, that the verdict has *some* support in the record? Nowhere does the Respondent's Brief address itself to this question. Nowhere does the opinion of the majority below do so. Respondent's Brief (Br. 29-33) lends no weight to that opinion for it reads the evidence in the light *least favorable to the petitioner*. At no point does it even attempt to demonstrate error in our evaluation of the evidence supporting the trial judge's view (Br. 25-28). Neither the opinion nor the Brief attempts an objective consideration of the damages. Both fall prey to the basic fault of viewing the verdict subjectively. The majority below says: "we cannot . . . arrive at a sum in excess of \$200,000." (A. 66). Is this any more than saying "if we had tried this case, we would not have awarded more than \$200,000?" How diametrically opposed is this even to the *Neese* test (?) which prohibits subjective review and would allow only the question whether the verdict and the trial court's action are without any support in the record.

Respondent's argument that \$100,000 is the "maximum that the jury could have awarded for loss of future income" (Br. 26-27) is sheer nonsense. It assumes to fix petitioner's income for the next 27½ years at \$6,000; it

ignores the evidence of past, and the probability of future, wage increases; it shuts its eyes to the possibility of overtime work and promotions. It makes to this Court the argument which it might have made to the jury if it had asked at the trial for a verdict not exceeding \$200,000.

Its further argument as to the interest rate obtainable on the entire verdict is sophomoric. Its counsel know as well as do all others dealing with this and any other physical injury case that the law does not base a lump-sum award for pain, suffering, inconvenience and embarrassment on the annual amount which the award will yield when invested. The proposition it puts forth has no more validity than that used before juries in some cases (not in this one) that the award should be based on a per diem allowance: 32 years—11,680—250,320 hours at \$1 per hour or \$250,320 for pain alone, allowing nothing for the loss of the right to enjoy a normal life.

Equally lacking justification is the recitation of verdicts in other cases in its Brief and the Appendix thereto. The age of the computer has not (as yet) made the comparison of verdicts in other cases a factor in judging the quantum of a verdict. If it ever should, a review of the entire record in each such case will be required.

Almost 40 years ago Dean Leon Green, in "Judges & Jury" (1930), discussed in some detail the manner in which the growth of appellate power had, by innumerable devices, substantive and procedural, taken over control of jury trials. His comment at that time is still pertinent to any consideration of the extension of this power by the Court.

"In brief, the extravagant pains we take to preserve the integrity of jury trial in final analysis are completely counteracted in the more extravagant provisions which we make for appellate review, together with the remarkable technique appellate courts have

developed for subjecting every phase of trial to their own scrutiny and judgment." (at p. 391).

Respectfully submitted,

MILFORD J. MEYER  
One East Penn Square  
Philadelphia, Pa. 19107

*Attorney for Petitioner*

*Of Counsel:*

IRVING YOUNGER  
MEYER, LASCH, HANKIN & POUL